

# STATE OF NEW YORK

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3316

2019-2020 Regular Sessions

## IN SENATE

February 5, 2019

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Introduced by Sen. FUNKE -- read twice and ordered printed, and when printed to be committed to the Committee on Crime Victims, Crime and Correction

AN ACT to amend the correction law, in relation to notice to sex offenders of their determination hearing and the penalty for violations by sex offenders

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions 2 and 4 of section 168-d of the correction  
2 law, subdivision 2 as amended and subdivision 4 as added by chapter 684  
3 of the laws of 2005, are amended to read as follows:  
4 2. Any sex offender, who is released on probation or discharged upon  
5 payment of a fine, conditional discharge or unconditional discharge  
6 shall, prior to such release or discharge, be informed of his or her  
7 duty to register under this article by the court in which he or she was  
8 convicted. At the time sentence is imposed, such sex offender shall  
9 register with the division on a form prepared by the division. The court  
10 shall require the sex offender to read and sign such form and to  
11 complete the registration portion of such form. The court shall on such  
12 form obtain the address where the sex offender expects to reside upon  
13 his or her release, and the name and address of any institution of high-  
14 er education he or she expects to be employed by, enrolled in, attending  
15 or employed, whether for compensation or not, and whether he or she  
16 expects to reside in a facility owned or operated by such an institu-  
17 tion, and shall report such information to the division. The court shall  
18 give one copy of the form to the sex offender and shall send two copies  
19 to the division which shall forward the information to the law enforce-  
20 ment agencies having jurisdiction. The court shall also notify the  
21 district attorney and the sex offender of the date of the determination  
22 proceeding to be held pursuant to subdivision three of this section,  
23 which shall be held at least forty-five days after such notice is given.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 [~~This~~] The notice to the sex offender shall include the following state-  
2 ment [~~or a substantially similar statement~~]: "This proceeding is being  
3 held to determine whether you will be classified as a level 3 offender  
4 (risk of repeat offense is high), a level 2 offender (risk of repeat  
5 offense is moderate), or a level 1 offender (risk of repeat offense is  
6 low), or whether you will be designated as a sexual predator, a sexually  
7 violent offender or a predicate sex offender, which will determine how  
8 long you must register as a sex offender and how much information can be  
9 provided to the public concerning your registration. You have a right to  
10 a hearing before the court makes these determinations. You have a right  
11 to be represented by counsel at that hearing. Counsel will be provided  
12 if you are financially unable to retain counsel. Failure to appear at  
13 the hearing is a violation of this article. If you fail to appear at  
14 this proceeding, [~~without sufficient excuse,~~] it shall be held in your  
15 absence. Failure to appear may result in a longer period of registration  
16 or a higher level of community notification because you are not present  
17 to offer evidence or contest evidence offered by the district attorney."  
18 [~~The court shall also advise the sex offender that he or she has a right  
19 to a hearing prior to the court's determination, that he or she has the  
20 right to be represented by counsel at the hearing and that counsel will  
21 be appointed if he or she is financially unable to retain counsel.~~] If  
22 the sex offender applies for assignment of counsel to represent him or  
23 her at the hearing and counsel was not previously assigned to represent  
24 the sex offender in the underlying criminal action, the court shall  
25 determine whether the offender is financially unable to retain counsel.  
26 If such a finding is made, the court shall assign counsel to represent  
27 the sex offender pursuant to article eighteen-B of the county law. Where  
28 the court orders a sex offender released on probation, such order must  
29 include a provision requiring that he or she comply with the require-  
30 ments of this article. Where such sex offender violates such provision,  
31 probation may be immediately revoked in the manner provided by article  
32 four hundred ten of the criminal procedure law.

33 4. If a sex offender, having been given notice of the determination  
34 proceeding, including the time and place [~~of the determination proceed-~~  
35 ~~ing~~] thereof in accordance with this section, fails to appear and be  
36 heard at [~~this~~] such proceeding, [~~without sufficient excuse,~~] the court  
37 shall conduct the hearing and make the determinations in the manner set  
38 forth in subdivision three of this section.

39 § 2. Section 168-f of the correction law is amended by adding a new  
40 subdivision 1-a to read as follows:

41 1-a. Each sex offender shall appear at the determination proceeding,  
42 set forth in subdivision three of section one hundred sixty-eight-d of  
43 this article, subdivision two of section one hundred sixty-eight-k of  
44 this article or subdivision three of section one hundred sixty-eight-n  
45 of this article, held to determine the level of notification and whether  
46 such sex offender shall be designated a sexual predator, sexually  
47 violent offender, or predicate sex offender.

48 § 3. Paragraph (c) of subdivision 2 of section 168-f of the correction  
49 law, as amended by chapter 453 of the laws of 1999, is amended to read  
50 as follows:

51 (c) If the sex offender fails to mail the signed verification form to  
52 the division within ten calendar days after receipt of the form, he or  
53 she shall be in violation of this [~~section unless he proves that he or~~  
54 ~~she has not changed his or her residence address~~] article.

1 § 4. Subdivisions 2 and 4 of section 168-k of the correction law,  
2 subdivision 2 as amended and subdivision 4 as added by chapter 684 of  
3 the laws of 2005, are amended to read as follows:

4 2. The division shall advise the board that the sex offender has  
5 established residence in this state. The board shall determine whether  
6 the sex offender is required to register with the division. If it is  
7 determined that the sex offender is required to register, the division  
8 shall notify the sex offender of his or her duty to register under this  
9 article and shall require the sex offender to sign a form as may be  
10 required by the division acknowledging that the duty to register and the  
11 procedure for registration has been explained to the sex offender. The  
12 division shall obtain on such form the address where the sex offender  
13 expects to reside within the state and the sex offender shall retain one  
14 copy of the form and send two copies to the division which shall provide  
15 the information to the law enforcement agency having jurisdiction where  
16 the sex offender expects to reside within this state. No later than  
17 thirty days prior to the board making a recommendation, the sex offender  
18 shall be notified that his or her case is under review and that he or  
19 she is permitted to submit to the board any information relevant to the  
20 review. After reviewing any information obtained, and applying the  
21 guidelines established in subdivision five of section one hundred  
22 sixty-eight-1 of this article, the board shall within sixty calendar  
23 days make a recommendation regarding the level of notification pursuant  
24 to subdivision six of section one hundred sixty-eight-1 of this article  
25 and whether such sex offender shall be designated a sexual predator,  
26 sexually violent offender, or predicate sex offender as defined in  
27 subdivision seven of section one hundred sixty-eight-a of this article.  
28 This recommendation shall be confidential and shall not be available for  
29 public inspection. It shall be submitted by the board to the county  
30 court or supreme court and to the district attorney in the county of  
31 residence of the sex offender and to the sex offender. It shall be the  
32 duty of the county court or supreme court in the county of residence of  
33 the sex offender, applying the guidelines established in subdivision  
34 five of section one hundred sixty-eight-1 of this article, to determine  
35 the level of notification pursuant to subdivision six of section one  
36 hundred sixty-eight-1 of this article and whether such sex offender  
37 shall be designated a sexual predator, sexually violent offender, or  
38 predicate sex offender as defined in subdivision seven of section one  
39 hundred sixty-eight-a of this article. At least thirty days prior to the  
40 determination proceeding, such court shall notify the district attorney  
41 and the sex offender, in writing, of the date of the determination  
42 proceeding and the court shall also provide the district attorney and  
43 sex offender with a copy of the recommendation received from the board  
44 and any statement of the reasons for the recommendation received from  
45 the board. ~~[This]~~ The notice to the sex offender shall include the  
46 following statement ~~[or a substantially similar statement]~~: "This  
47 proceeding is being held to determine whether you will be classified as  
48 a level 3 offender (risk of repeat offense is high), a level 2 offender  
49 (risk of repeat offense is moderate), or a level 1 offender (risk of  
50 repeat offense is low), or whether you will be designated as a sexual  
51 predator, a sexually violent offender or a predicate sex offender, which  
52 will determine how long you must register as a sex offender and how much  
53 information can be provided to the public concerning your registration.  
54 You have a right to a hearing before the court makes these determi-  
55 nations. You have a right to be represented by counsel at that hearing.  
56 Counsel will be provided if you are financially unable to retain coun-

1 sel. Failure to appear at the hearing is a violation of this article. If  
2 you fail to appear at this proceeding, [~~without sufficient excuse,~~] it  
3 shall be held in your absence. Failure to appear may result in a longer  
4 period of registration or a higher level of community notification  
5 because you are not present to offer evidence or contest evidence  
6 offered by the district attorney." [~~The court shall also advise the sex  
7 offender that he or she has a right to a hearing prior to the court's  
8 determination, that he or she has the right to be represented by counsel  
9 at the hearing and that counsel will be appointed if he or she is finan-  
10 cially unable to retain counsel.~~] A returnable form shall be enclosed in  
11 the court's notice to the sex offender on which the sex offender may  
12 apply for assignment of counsel. If the sex offender applies for  
13 assignment of counsel and the court finds that the offender is finan-  
14 cially unable to retain counsel, the court shall assign counsel to  
15 represent the sex offender pursuant to article eighteen-B of the county  
16 law. If the district attorney seeks a determination that differs from  
17 the recommendation submitted by the board, at least ten days prior to  
18 the determination proceeding the district attorney shall provide to the  
19 court and the sex offender a statement setting forth the determinations  
20 sought by the district attorney together with the reasons for seeking  
21 such determinations. The court shall allow the sex offender to appear  
22 and be heard. The state shall appear by the district attorney, or his or  
23 her designee, who shall bear the burden of proving the facts supporting  
24 the determinations sought by clear and convincing evidence. It shall be  
25 the duty of the court applying the guidelines established in subdivision  
26 five of section one hundred sixty-eight-1 of this article to determine  
27 the level of notification pursuant to subdivision six of section one  
28 hundred sixty-eight-1 of this article and whether such sex offender  
29 shall be designated a sexual predator, sexually violent offender, or  
30 predicate sex offender as defined in subdivision seven of section one  
31 hundred sixty-eight-a of this article. Where there is a dispute between  
32 the parties concerning the determinations, the court shall adjourn the  
33 hearing as necessary to permit the sex offender or the district attorney  
34 to obtain materials relevant to the determinations from the state board  
35 of examiners of sex offenders or any state or local facility, hospital,  
36 institution, office, agency, department or division. Such materials may  
37 be obtained by subpoena if not voluntarily provided to the requesting  
38 party. In making the determinations the court shall review any victim's  
39 statement and any relevant materials and evidence submitted by the sex  
40 offender and the district attorney and the recommendation and any mate-  
41 rial submitted by the board, and may consider reliable hearsay evidence  
42 submitted by either party, provided that it is relevant to the determi-  
43 nations. If available, facts proven at trial or elicited at the time of  
44 a plea of guilty shall be deemed established by clear and convincing  
45 evidence and shall not be relitigated. The court shall render an order  
46 setting forth its determinations and the findings of fact and conclu-  
47 sions of law on which the determinations are based. A copy of the order  
48 shall be submitted by the court to the division. Upon application of  
49 either party, the court shall seal any portion of the court file or  
50 record which contains material that is confidential under any state or  
51 federal statute. Either party may appeal as of right from the order  
52 pursuant to the provisions of articles fifty-five, fifty-six and fifty-  
53 seven of the civil practice law and rules. Where counsel has been  
54 assigned to represent the sex offender upon the ground that the sex  
55 offender is financially unable to retain counsel, that assignment shall  
56 be continued throughout the pendency of the appeal, and the person may

1 appeal as a poor person pursuant to article eighteen-B of the county  
2 law.

3 4. If a sex offender, having been given notice of the determination  
4 proceeding, including the time and place [~~of the determination proceed-~~  
5 ~~ing~~] thereof in accordance with this section, fails to appear and be  
6 heard at [~~this~~] such proceeding, [~~without sufficient excuse,~~] the court  
7 shall conduct the hearing and make the determinations in the manner set  
8 forth in subdivision two of this section.

9 § 5. Subdivisions 3 and 6 of section 168-n of the correction law,  
10 subdivision 3 as amended and subdivision 6 as added by chapter 684 of  
11 the laws of 2005, are amended to read as follows:

12 3. No later than thirty days prior to the board's recommendation, the  
13 sex offender shall be notified that his or her case is under review and  
14 that he or she is permitted to submit to the board any information rele-  
15 vant to the review. Upon receipt of the board's recommendation, the  
16 sentencing court shall determine whether the sex offender was previously  
17 found to be eligible for assigned counsel in the underlying case. Where  
18 such a finding was previously made, the court shall assign counsel to  
19 represent the offender, pursuant to article eighteen-B of the county  
20 law. At least twenty days prior to the determination proceeding, the  
21 sentencing court shall notify the district attorney, the sex offender  
22 and the sex offender's counsel, in writing, of the date of the determi-  
23 nation proceeding and shall also provide the district attorney, the sex  
24 offender and the sex offender's counsel with a copy of the recommenda-  
25 tion received from the board and any statement of the reasons for the  
26 recommendation received from the board. [~~This~~] The notice to the sex  
27 offender shall include the following statement [~~or a substantially simi-~~  
28 ~~lar statement~~]: "This proceeding is being held to determine whether you  
29 will be classified as a level 3 offender (risk of repeat offense is  
30 high), a level 2 offender (risk of repeat offense is moderate), or a  
31 level 1 offender (risk of repeat offense is low), or whether you will be  
32 designated as a sexual predator, a sexually violent offender or a predi-  
33 cate sex offender, which will determine how long you must register as a  
34 sex offender and how much information can be provided to the public  
35 concerning your registration. You have a right to a hearing before the  
36 court makes these determinations. You have a right to be represented by  
37 counsel at that hearing. Counsel will be provided if you are financially  
38 unable to retain counsel. Failure to appear at the hearing is a  
39 violation of this article. If you fail to appear at this proceeding,  
40 [~~without sufficient excuse,~~] it shall be held in your absence. Failure  
41 to appear may result in a longer period of registration or a higher  
42 level of community notification because you are not present to offer  
43 evidence or contest evidence offered by the district attorney." [~~The~~  
44 ~~written notice to the sex offender shall also advise the offender that~~  
45 ~~he or she has a right to a hearing prior to the court's determination,~~  
46 ~~and that he or she has the right to be represented by counsel at the~~  
47 ~~hearing.~~] If counsel has been assigned to represent the offender at the  
48 determination proceeding, the notice shall also provide the name,  
49 address and telephone number of the assigned counsel. Where counsel has  
50 not been assigned, [~~the notice shall advise the sex offender that coun-~~  
51 ~~sel will be appointed if he or she is financially unable to retain coun-~~  
52 ~~sel, and~~] a returnable form shall be enclosed in the court's notice to  
53 the sex offender on which the sex offender may apply for assignment of  
54 counsel. If the sex offender applies for assignment of counsel and the  
55 court finds that the offender is financially unable to retain counsel,  
56 the court shall assign counsel to represent the sex offender pursuant to

1 article eighteen-B of the county law. If the district attorney seeks a  
2 determination that differs from the recommendation submitted by the  
3 board, at least ten days prior to the determination proceeding the  
4 district attorney shall provide to the court and the sex offender a  
5 statement setting forth the determinations sought by the district attor-  
6 ney together with the reasons for seeking such determinations. The court  
7 shall allow the sex offender to appear and be heard. The state shall  
8 appear by the district attorney, or his or her designee, who shall bear  
9 the burden of proving the facts supporting the determinations sought by  
10 clear and convincing evidence. Where there is a dispute between the  
11 parties concerning the determinations, the court shall adjourn the hear-  
12 ing as necessary to permit the sex offender or the district attorney to  
13 obtain materials relevant to the determinations from the state board of  
14 examiners of sex offenders or any state or local facility, hospital,  
15 institution, office, agency, department or division. Such materials may  
16 be obtained by subpoena if not voluntarily provided to the requesting  
17 party. In making the determinations the court shall review any victim's  
18 statement and any relevant materials and evidence submitted by the sex  
19 offender and the district attorney and the recommendation and any mate-  
20 rials submitted by the board, and may consider reliable hearsay evidence  
21 submitted by either party, provided that it is relevant to the determi-  
22 nations. Facts previously proven at trial or elicited at the time of  
23 entry of a plea of guilty shall be deemed established by clear and  
24 convincing evidence and shall not be relitigated. The court shall render  
25 an order setting forth its determinations and the findings of fact and  
26 conclusions of law on which the determinations are based. A copy of the  
27 order shall be submitted by the court to the division. Upon application  
28 of either party, the court shall seal any portion of the court file or  
29 record which contains material that is confidential under any state or  
30 federal statute. Either party may appeal as of right from the order  
31 pursuant to the provisions of articles fifty-five, fifty-six and fifty-  
32 seven of the civil practice law and rules. Where counsel has been  
33 assigned to represent the sex offender upon the ground that the sex  
34 offender is financially unable to retain counsel, that assignment shall  
35 be continued throughout the pendency of the appeal, and the person may  
36 appeal as a poor person pursuant to article eighteen-B of the county  
37 law.

38 6. If a sex offender, having been given notice of the determination  
39 proceeding, including the time and place [~~of the determination proceed-~~  
40 ~~ing~~] thereof in accordance with this section, fails to appear and be  
41 heard at [~~this~~] such proceeding, [~~without sufficient excuse,~~] the court  
42 shall conduct the hearing and make the determinations in the manner set  
43 forth in subdivision three of this section.

44 § 6. Section 168-t of the correction law, as amended by chapter 373 of  
45 the laws of 2007, is amended to read as follows:

46 § 168-t. [~~Penalty~~] Failure to register, appear at the determination  
47 proceeding, annually verify, personally verify, notify of status at an  
48 institution of higher education, notify of address change or change of  
49 status at an institution of higher education, notify of establishment of  
50 residence in state, or comply with the prohibition of employment on  
51 motor vehicles engaged in retail sale of frozen desserts; penalty. 1.  
52 Any sex offender required to register [~~or to verify~~] pursuant to the  
53 provisions of this article [~~who fails to register or verify in the~~  
54 ~~manner and within the time periods provided for in this article shall~~  
55 ~~be~~] is guilty of [~~a class E felony upon conviction for the first~~  
56 ~~offense, and upon conviction for a second or subsequent offense shall be~~

1 ~~guilty of~~ failure to register, appear at the determination proceeding,  
2 annually verify, personally verify, notify of status at an institution  
3 of higher education, notify of address change or change of status at an  
4 institution of higher education, notify of establishment of residence in  
5 state, or comply with the prohibition of employment on motor vehicles  
6 engaged in the retail sale of frozen desserts when he or she:

7 (a) Fails to register with the division on a form prepared by the  
8 division (i) at least ten calendar days prior to discharge, parole,  
9 release to post-release supervision or release from any state or local  
10 correctional facility, hospital or institution where he or she was  
11 confined or committed, or (ii) at the time sentence is imposed for any  
12 sex offender released on probation or discharged upon payment of a fine,  
13 conditional discharge or unconditional discharge, or (iii) upon the  
14 division's request following a determination by the board that the  
15 offender is required to register pursuant to subdivision two of section  
16 one hundred sixty-eight-k of this article; or

17 (b) Fails to appear at the determination proceeding, set forth in  
18 subdivision three of section one hundred sixty-eight-d of this article,  
19 subdivision two of section one hundred sixty-eight-k of this article or  
20 subdivision three of section one hundred sixty-eight-n of this article,  
21 held to determine the level of notification and whether such sex offen-  
22 der shall be designated a sexual predator, sexually violent offender, or  
23 predicate sex offender; or

24 (c) Fails to sign and return to the division the annual verification  
25 form mailed by the division to his or her last reported address pursuant  
26 to section one hundred sixty-eight-b of this article within ten calendar  
27 days after receipt of the form; or

28 (d) Fails to personally verify his or her address with the local law  
29 enforcement agency every ninety calendar days after the date of release  
30 or commencement of parole or post-release supervision, or probation, or  
31 release on payment of a fine, conditional discharge or unconditional  
32 discharge after having been given a level three designation or having  
33 been designated a sexual predator; or

34 (e) Fails to provide the division with the name and address of any  
35 institution of higher education he or she expects to be employed by,  
36 enrolled in, attending or employed at, whether for compensation or not,  
37 and whether he or she expects to reside in a facility owned or operated  
38 by such an institution; or

39 (f) Fails to notify the division no later than ten calendar days after  
40 any change of address; or

41 (g) Fails to notify the division no later than ten calendar days after  
42 any change of status at an institution of higher education; or

43 (h) Fails to notify the division within ten calendar days after estab-  
44 lishing residence in this state in the case of a sex offender who has  
45 been convicted of an offense which requires registration under paragraph  
46 (d) of subdivision two of section one hundred sixty-eight-a of this  
47 article or paragraph (b) of subdivision three of section one hundred  
48 sixty-eight-a of this article; or

49 (i) Violates the provisions of section one hundred sixty-eight-v of  
50 this article.

51 2. Failure to register, appear at the determination proceeding, annu-  
52 ally verify, personally verify, notify of status at an institution of  
53 higher education, notify of address change or change of status at an  
54 institution of higher education, notify of establishment of residence in  
55 state, or comply with the prohibition of employment on motor vehicles  
56 engaged in the retail sale of frozen desserts is a class D felony. [Any

1 ~~sex offender who violates the provisions of section one hundred sixty-~~  
2 ~~eight-v of this article shall be guilty of a class A misdemeanor upon~~  
3 ~~conviction for the first offense, and upon conviction for a second or~~  
4 ~~subsequent offense shall be guilty of a class D felony.]~~

5 3. Any such failure [~~to register or verify~~] may also be the basis for  
6 revocation of parole pursuant to section two hundred fifty-nine-i of the  
7 executive law or the basis for revocation of probation pursuant to arti-  
8 cle four hundred ten of the criminal procedure law.

9 § 7. This act shall take effect immediately.